

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

**IN THE MATTER OF: The claim for
reimbursement under the PECTA
Program by**

MADISON HEARING OFFICE
1801 Aberg Ave. Suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608) 242-4813

Jack Horak

**Hearing Number: 96-41
Re: PECFA Claim # 54401-5379-06**

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send you objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to the Deputy Secretary of the Department of Commerce, to make the FINAL Decision in this matter.

STATE HEARING OFFICER:

James H Moe

DATED AND MAILED

February 11, 1997

MAILED TO:

Appellant Agent or Attorney

Jack Horak
Horak's Automotive Service Ctr
1706 W. Stewart Avenue
Wausau, WI 54401-5379

Department of Commerce

Attorney Michael Mathis
201 E. Washington Avenue
P.O. Box 8941
Madison, WI 53708

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

In the matter of the

REQUEST FOR REIMBURSEMENT PURSUANT
TO THE PROVISIONS OF THE PECFA PROGRAM

Hearing Number 96-41
PECFA Claim Number 54401-5379-06

Jack Horak

vs..

Wisconsin Department of Commerce

A decision was issued on August 28, 1995, by the Department of Industry, Labor and Human Relations, allowing payment of PECFA reimbursement with regard to a property known as Horak's Automotive Service Center, operated by Jack E. Horak. Of the entire reimbursement sought, amounts totaling \$20,685.91 were disallowed. The claimant appealed from that denial, and a hearing was held on September 24, 1996 with regard to the propriety of the department's decision denying payment.

The claimant has now dropped his claim to amounts originally denied of \$1.37 and \$2.80 identified as over allowable state mileage rates and \$500 identified as a duplicate charge. Those amounts are not at issue at this time.

Administration of the PECFA Program was subsequently transferred to the newly-created Wisconsin Department of Commerce. The secretary of that department delegated administrative law judge James H. Moe, of the Wisconsin Department of Workforce Development (previously the Department of Industry, Labor and Human Relations) to hear the appeal.

Based on the applicable records and evidence in this case, including the testimony given at the September 1996, hearing, the state hearing officer makes the following

PROPOSED FINDINGS OF FACT

1. At all times material, Jack, E. Horak, (hereinafter claimant) was the owner and operator of a business known as Horak's Automotive Service Center located at 1706 Stewart Avenue, Wausau, Wisconsin where a petroleum distribution business operated. At that location there were two separate tank beds.
2. The south tank bed (hereinafter large tank bed) contained two 10,000 gallon tanks, one 6,000 gallon tank, and one 4,000 gallon tank. The north tank bed (hereinafter small tanks bed) contained two 500 gallon tanks and two 250 gallon tanks.
3. The tank removal work was performed on December 2, 3, and 4 of 1991.

4. Analytical testing confirmed petroleum discharge under one 10,000 gallon tank in the large tank and under one 250 gallon tank in the small tank bed. There was no confirmed petroleum discharge under the remaining six tanks.
5. A PECFA claim was submitted for the work described.

PROPOSED DISCUSSION AND CONCLUSION OF LAW

The department denied reimbursement of a portion of an invoice from Advent Environmental Services, Inc., in the amount of \$150 for vehicle rental charges for three days. That amount was denied on the basis that the billing for both mileage and rental fees was a duplication of services.

The claimant explained that only 303 out of 450 miles driven were charged, and that the daily vehicle charge of \$50 included fifty miles not otherwise billed. Based on that explanation, the department conceded that an additional 151 miles were allowable at the rate of forty cents per mile. Accordingly, payment of \$60 will be authorized. The remaining \$90 of those costs associated with vehicle rental may not be reimbursed.

The department denied reimbursement of a portion of an invoice from Peli-Clean Car Wash and Excavating in the amount of \$7,585.88 which included \$6,112.88 of costs not integral to excavate the two contaminated tanks, \$297 of costs for granite-like topsoil and \$1176 of costs related to harm to the business.

The claimant explained that the costs of \$1176 related to shoring up sign footings were necessary in order to prevent a business sign from potentially collapsing into the void left as the tanks were removed from the large tank bed. The PECFA overview in effect at the time the work was performed excluded from reimbursement costs associated with damage or repair to buildings, sewer lines, electrical lines, and related items. While such work might very well have been necessary to prevent catastrophe to the business sign, it nevertheless constitutes the type of work that was not eligible for reimbursement here. Therefore the denial of reimbursement of those costs totaling \$1176 was appropriate.

The claimant argued that the remaining costs totaling \$8,432, should be reimbursed. The department conceded that backfill cost of \$297 should have been included when determining the total amount eligible for reimbursement. The PECFA overview in effect at the time this work was performed provided that “petroleum storage tank removals not integral to the cleanup action” (PECFA is not a tank removal fund) were not eligible costs under the PECFA program. Accordingly, the department limited reimbursement of removal costs to tanks that had analytical tests confirming discharges. That is a reasonable interpretation.

In this instance, because analytical testing confirmed discharges under two of the eight tanks removed, the grant reviewer concluded that 2/8 of the removal costs were eligible for reimbursement. However, it is more equitable to determine the eligible costs based on the ratio of the volume of the two tanks with confirmed discharges to the total volume of all the tanks removed. Here that ratio is 10,250/31,500 gallons removed. Accordingly, \$2,743.75 of that amount may be reimbursed. Since the initial decision already allowed costs of \$2,022.12, an additional \$721.63 may be reimbursed. The total amount of the Peli-Clean invoice not eligible for reimbursement is \$5,688.25.

The department denied reimbursement of a portion of an invoice from Lincoln Contractor Supply in the amount of \$224.71 on the basis that those tank removal costs were not integral to remediation of the site.

As indicated above the claim reviewer allowed 2/8 of the invoice. However, using the ratio of the total contaminated tank gallons removed to the total tank gallons removed, the amount of \$97.50 may be reimbursed. Since the initial decision already allowed \$74.91, an additional \$22.59 may be reimbursed. The amount not eligible for reimbursement is \$202.12.

The department denied reimbursement of a portion of an invoice from Northwest Petroleum Services, Inc. in the amount of \$97.50. The basis for the denial was that such amounts appeared to relate to in-house mark-ups and were not supported by any subcontractor invoices.

Although the claimant explained that the denied amounts were associated with mark-ups on services provided by Peli-Clean Car Wash and Excavating, the denial of reimbursement of those amounts was appropriate.

The department denied reimbursement of a portion of another Northwest Petroleum Service, Inc. invoice in the amount of \$7,069.72, which included \$6469.72 not integral to the tank removal, \$575 of soil samples not supported by a subcontractor invoice, and \$25 in excess of the maximum allowed for an HNU meter.

At the hearing the department conceded that the costs of \$575 and \$25 should not have been excluded when determining the total invoice amount that was reimbursable. Therefore those amounts will be considered in the determination of the total amount of the invoice that is reimbursable, as described below.

Of the total amount of the invoice \$64.70 was not claimed. The claimant contended that the balance of \$9408.03 should be reimbursed. Costs of \$109.25 for waste oil disposal may not be reimbursed. Costs of \$30.34 for a profile fee for sludge product were not supported by a sub-contractor invoice and may not be reimbursed. Of the remaining \$9,268.44, costs associated with the removal of the two contaminated tanks are \$3015.92 and therefore may be reimbursed. Since \$2338.73 of that amount has already been reimbursed, an additional \$677.19 may be reimbursed. Denial of the balance of \$6,392.11 was appropriate.

The department denied reimbursement of an invoice from Van Ert Electric Company, Inc., totaling \$404.79. This amount was denied on the basis that it was a cost to repair damage caused by excavation.

The denied amount related to the costs of running a new electrical conduit on the premises. The claimant explained that such costs should be reimbursed because the electrical line ran across the large tank bed and the tank removal could not be performed without damage to the line. The PECFA overview in effect at the time those services were performed provided costs associated with damage or repair to electrical lines were not eligible for reimbursement. Therefore the above costs are not eligible for reimbursement.

The department denied reimbursement of an invoice from STS Consultants, Ltd., for \$77.05. The basis for the denial was that it was for analytical testing for non-petroleum constituents.

As part of the bailing process performed prior to testing of test wells on the premises, the claimant accumulated waste water. He explained that the City of Wausau required him to perform tests for chlorinated products on such waste water in order to receive permission to dispose the waste water into the city sewer system. Although another entity may have received such testing, such testing was not for any covered petroleum product and is therefore not eligible for reimbursement under the PECFA program. The denial of reimbursement for that amount was appropriate.

The department denied reimbursement of another STS Consultants, Ltd., invoice amounting to \$663 for a second volatile organic compound test. The basis of the denial was that it was not for testing for any covered petroleum product.

The claimant explained that another department of state government required that a second testing for the full suite of volatile organic compounds be conducted. However as noted above, the PECFA program is not designed to reimburse costs not associated with covered petroleum products. Since the denied costs were for non-petroleum product testing, the denial of reimbursement was appropriate.

The department denied a portion of three additional invoices for STS Consultants, Ltd., in the amounts of \$89.41, \$80.08, and \$68.50. The basis for the denial was that such costs were for priority shipping charges.

The claimant explained that such costs were necessitated in order to ship analytical work to the lowest cost bidder. However the PECFA overview in effect at the time stated that "rush charges for laboratory testing or other services" were not eligible for reimbursement. Consequently, the denial of reimbursement of those costs was appropriate.

The claimant argues that only one deductible was appropriate in this instance since only one site was involved. However, the department has consistently calculated deductible amounts not on a site basis but on a "plume of contamination" basis. In this instance, there was no evidence to suggest any intermingling of the plumes of contamination from the small tank bed and the large tank bed. Therefore the application of two deductible amounts was appropriate.

The state hearing officer therefore finds that the department was correct in denying reimbursement of \$90 for services of Advent Environmental; \$5,688.25 for services of Peli-Clean Car Wash and Excavating; \$202.12 for services of Lincoln Contractor Supply; \$97.50 for services of Northwest Petroleum Services, Inc.; \$6,392.11 for services of Northwest Petroleum Services, Inc.; \$404.79 for services of Van Ert Electric Company, Inc.; \$77.05 for services of STS Consultants, Ltd.; \$663 for services of STS Consultants, Ltd.; \$89.41, \$80.08, and \$68.50 for services of STS Consultants, Ltd..

The state hearing officer further finds that the department was incorrect in denying reimbursement of \$60 for services of Advent Environmental; \$721.63 for services of Peli-Clean Car Wash and Excavating; \$22.59 for services of Lincoln Contractor Supply; \$677.19 for services of Northwest Petroleum Service.

PROPOSED DECISION

The department shall reimburse Jack Horak an additional \$1481.41, the total of the approved charges in the findings and conclusions above plus any applicable interest charges or other adjustments, if necessary. The department's decision to deny all other contested amounts is affirmed.

February 11, 1997

Dated and Mailed

James H.. Moe

State Hearing Officer

Appellant

Department of Commerce

Jack Horak

Horak's Automotive Service Center

1706 W. Stewart Avenue

Wausau, WI 54401-5379

Attorney Michael Mathis

201 E Washington Avenue

P.O. Box 8942

Madison, WI 53708